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Supreme Court, U.S.
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NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2001

KURT JONES, Warden

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AFFIDAVIT IN SUPPORT OF MOTION

STATE APPELLATE DEFENDER OFFICE

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NO. 01-1413

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v.

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Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Oliver French, Jr., respectfully asks this Honorable Court for leave to proceed *in forma pauperis* so that he may file the accompanying Brief in Opposition to Petition for a Writ of Certiorari with this Court.

Respondent was found by the state trial court to be indigent for purposes of state appellate proceedings, was appointed counsel for that purpose, and is still represented in this Court by that appointed counsel.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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(313) 256-9833

Attorney for Respondent

Dated: April 23, 2002

NO. 01-1413

IN THE SUPREME COURT OF THE UNITED STATES

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KURT JONES,

Petitioner,

v.

OLIVER FRENCH, JR.,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Oliver French, Jr., being first duly sworn, depose and say that I am the Respondent in the above-entitled case and that because of my poverty I am unable to pay the costs associated with defending in this Court the judgment of the United States Court of Appeals for the Sixth Circuit.

I further swear that the responses which I make below relating to my ability to pay the costs of defending this appeal are true:

1. Are you presently employed? Yes

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

My salary a month, $60.00. My yearly income with overtime, from 2001-2002, totaled $1192.00. As of 2-26-02, I have $1200.17, in my account. Work address, Macomb Correctional Fac., 34625 26 Mile Rd., New Haven, Michigan 48048.

BEST AVAILABLE COPY

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? NO

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? NO

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? NO

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to the penalties for perjury.

OLIVER FRENCH, JR.

Subscribed and sworn to before me
this 01 day of April, 2002.

LISA A. WALSH
NOTARY PUBLIC MACOMB CO., MI
MY COMMISSION EXPIRES Dec 6, 2005

Notary Public, Macomb County, Michigan
My Commission Expires: 12/05/2005

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATE APPELLATE DEFENDER OFFICE

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STATEMENT OF THE CASE

Petitioner has omitted the full history of this case in federal court and neglected to append the first set of opinions from the district court and the Sixth Circuit. Respondent, Oliver French, Jr., therefore appends those opinions and briefly discusses the history of this case.

The district court first granted Respondent's habeas petition in 1999. *French v. Jones*, 41 F.Supp.2d 726 (E.D. Mich. 1999) (1b-17b). In granting the petition the district court agreed with the Michigan Court of Appeals that Respondent's Sixth Amendment right to the assistance of counsel at all critical stages of his trial had been violated when the trial court, in the complete absence of Respondent's two attorneys, delivered an extemporaneous and improper deadlock jury instruction to a jury that had three times declared itself hopelessly deadlocked. *Id.*, 41 F.Supp.2d at 730-732 (7b-10b); *see also People v. French*, No. 186834 (Mich. Ct. App. 1997) (38a-39a) (finding Respondent's Sixth Amendment rights violated by absence of counsel). In so holding, the district court, like the Michigan Court of Appeals, specifically considered and rejected Petitioner's argument that a purported California attorney named Ty Jones was serving as Respondent's counsel at the time of the reinstruction. *Id.*, 41 F.Supp.2d at 730-731 (7b-19b); *see also People v. French, supra* (37a-38a, 39a) (noting prosecutor's argument that Ty Jones served as Respondent's counsel but holding "defendant's Sixth Amendment right was violated").

The district court held that the Michigan Court of Appeals' holding that the absence of counsel at a critical stage was subject to harmless error analysis was contrary to, or an unreasonable application of, several of this Court's decisions, including *United States v. Cronic*, 466 U.S. 648, 659 (1984); *Rushen v. Spain*, 464 U.S. 114, 119 n. 4 (1983); *Penson v. Ohio*,

488 U.S. 75, 88 (1988); and *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). *Id.*, 41 F.Supp.2d at 732-734 (10b-15b). The district court also observed that the Michigan Court of Appeals had never actually applied harmless error analysis but had simply declared the error to be harmless. *Id.*, 41 F.Supp.2d at 735 (15b-16b).

Petitioner appealed, and the Sixth Circuit issued an unpublished opinion vacating the district court's opinion and remanding for an evidentiary hearing to determine whether Ty Jones was acting as Respondent's counsel at the time the trial court gave its extemporaneous instruction to the deadlocked jury. *French v. Jones*, No. 99-1436 (6th Cir. 2000) (18b-29b). In so ordering, the Sixth Circuit specifically stated that it agreed that this Court's precedents would require automatic reversal if Respondent did not have counsel present during the trial court's extemporaneous reinstruction of the deadlocked jury. *See id.*, slip op. at 7-9 (24b-26b) (agreeing with district court that Supreme Court precedent mandates automatic reversal for absence of counsel at critical stage and reinstruction of a deadlocked jury is critical stage).

The district court held that evidentiary hearing and determined that Ty Jones had never served as Respondent's counsel and, in fact, had never been an attorney at all. Accordingly, the district court again granted the writ of habeas corpus. *French v. Jones*, 114 F.Supp.2d 638 (E.D. Mich. 2000) (19a-29a).

The Sixth Circuit affirmed. *French v. Jones*, 282 F.3d 893 (6th Cir. 2002) (1a-18a). In affirming, the Sixth Circuit first held that this Court's precedents automatically compelled a new trial because Respondent had no counsel present during a critical stage of his trial, the reinstruction of a deadlocked jury. *Id.*, 282 F.3d at 898-901 (8a-12a). The Sixth Circuit went on to hold, however, that the deprivation of counsel also "likely had a substantial and injurious

influence on the jury's verdict" because the trial judge gave an improper and extemporaneous deadlock jury instruction to a hopelessly deadlocked jury in the absence of Respondent's counsel. *Id.*, 282 F.3d at 901-902 (12a-14a).

ARGUMENT

I. **None of Petitioner's questions is presented by this case since the Sixth Circuit found both structural error and prejudice, since the absence of counsel clearly occurred at a critical stage, since the record does not support Petitioner's claim that the absence of counsel was attributable to the defense, and since the Sixth Circuit applied the correct standard of review.**

Petitioner's first question asks this Court to draw a line between absences of counsel caused by errors attributable to the State, which would be subject to automatic reversal, and absences of counsel attributable to the defense, which Petitioner argues should be subject to reversal only on showing of prejudice. Petitioner's second question asks this Court to declare that the extemporaneous reinstruction of Respondent's hopelessly deadlocked jury was not a critical stage because, according to Petitioner, nothing of importance really happened. Petitioner's third question consists of a complaint that the Sixth Circuit was insufficiently deferential to the state court.

None of Petitioner's questions is implicated by this litigation. In its first question, Petitioner overlooks the fact that the Sixth Circuit specifically found *both* that automatic reversal was required, *see French*, 282 F.3d at 898-901 (8a-12a), *and* that the error was substantial and injurious to the verdict. *See id.* at 901-902 (12a-14a). *Cf. Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc) (holding automatic reversal required, without finding prejudice, where attorney slept during portions of trial); *Cone v. Bell*, 243 F.3d 961 (6th Cir. 2001) (holding automatic reversal required, without finding prejudice, where attorney made no argument during capital sentencing hearing), *cert. granted*, 122 S.Ct. 663 (2001). Since the Sixth Circuit did find

substantial prejudice, a finding that is clearly correct. Petitioner cannot prevail even if this Court were to adopt Petitioner's argument.

Petitioner also could not prevail because no state or federal court in this case has ever found that the absence of Respondent's counsel was due to defense error. As discussed below, the record here unambiguously demonstrates that the trial court understood that Ty Jones was not serving as Respondent's counsel, but the trial court knowingly elected to conduct a critical stage without Respondent's counsel because counsel was seven minutes late.

Petitioner's second question is not presented because, as the Sixth Circuit found, the absence of counsel unquestionably occurred during a proceeding of great importance, namely the extemporaneous and improper reinstruction of a jury that had declared itself hopelessly deadlocked three times. After hearing the improper and coercive instructions without counsel present to object, the previously deadlocked jury returned a verdict. Finally, Petitioner's third question is not presented because the Sixth Circuit clearly applied the proper standard of review.

A. The Sixth Circuit correctly held that Respondent was deprived of counsel at a critical stage and, therefore, was entitled to automatic reversal.

The Sixth Circuit first held that Respondent was automatically entitled to a new trial because the trial court conducted a critical stage of the proceedings in the absence of defense counsel. That holding is correct. Five days after it began deliberating, having sent out two notes indicating that it was hopelessly deadlocked and having received two sets of deadlock jury instructions, the jury sent out an emphatic third note: "We are not able to reach a verdict. We are *not* going to reach a verdict." *French*, 282 F.3d at 896 (5a) (emphasis in original).

In response, the trial court brought the jury into the courtroom, in the complete absence of defense counsel, and delivered an extemporaneous instruction during which the court three times told the jurors that they had taken an oath to reach a verdict. *Id.* at 902 (14a). During this instruction, the court never warned the jurors against surrendering their honest beliefs in order to reach a verdict. *Id.* (13a-14a). The jury, which had declared itself hopelessly deadlocked on three occasions over several days, was suddenly able to reach a verdict, guilty but mentally ill, after less than two more hours of deliberations. *Id.* (14a).

On appeal, the Michigan Court of Appeals, after considering and rejecting the prosecutor's argument that Respondent did have counsel present in the person of Ty Jones, held that Respondent had been denied his Sixth Amendment right to the assistance of counsel at a critical stage. *People v. French*, No 186834 (Mich. Ct. App. 1997) (39a). However, the court went on to conclude that automatic reversal was not required. *Id.* (39a).

As the Sixth Circuit held, the Michigan Court of Appeals' refusal to automatically reverse Respondent's conviction is contrary to a raft of this Court's precedents, including *United States v. Cronic*, 466 U.S. 648, 659 & n. 25 (1984), *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978), *Penson v. Ohio*, 488 U.S. 75, 88 (1988), and *Brecht v. Abrahamson*, 507 U.S. 619, 629-630 (1993). *French*, 282 F.3d at 900 (10a-11a).[1]

---

[1] Petitioner characterizes this Court's discussion of the automatic reversal rule in *Cronic* as "dicta." Petition at 10. Petitioner ignores the fact that this Court has repeatedly stated the same rule both before and after *Cronic* and has repeatedly cited *Cronic* for this proposition. J2ust one month ago, this Court explained, "We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceedings. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. *See Cronic*, 466 U.S. at 658-659." *Mickens v. Taylor*, ___ U.S. ___, 122 S.Ct. 1237 (2002).

The trial court, the Michigan Court of Appeals, the district court, and the Sixth Circuit all correctly found that the instruction of a deliberating jury is a critical stage. *See, e.g., Shields v. United States*, 273 U.S. 583, 588-589 (1927), *Curtis v. Duval*, 124 F.3d 1, 4 (1st Cir. 1997) ("recalling the jury for supplemental instructions after deliberations are underway is a critical stage of a criminal trial"). In the context of Respondent's trial, it would be difficult to imagine a more critical stage than the judge's extemporaneous instructions to a jury that had three times declared itself hopelessly deadlocked, particularly since that final set of instructions produced a verdict after only a few more hours of deliberations.

The Sixth Circuit also correctly rejected Petitioner's claim, renewed here, that this case is similar to *Rushen v. Spain*, 464 U.S. 114 (1983). In *Rushen*, this Court held that harmless error analysis could be applied to the trial judge's *out-of-court* contact with a *single* member of the jury. 464 U.S. at 118-120. In so holding, this Court explicitly noted that such an *ex parte* contact is different for structural error purposes than the delivery of a supplemental instruction to the entire jury in the absence of counsel: "*See, e.g. Rogers v. United States*, 422 U.S. 35, 38-40 (1975) (although violation of Federal Rule of Criminal Procedure 43 may be harmless error, additional instructions from judge to jury, without notification to defendant or his counsel is not)." *Rushen*, 464 U.S. at 119 n. 4. Thus, this Court took pains to distinguish between an *out-of-court* contact with a member of the jury, which is presumably not a critical stage of a criminal trial, and the delivery of instructions to a deliberating jury, which obviously is.

In this Court, Petitioner argues that a reviewing court cannot determine whether a proceeding is a critical stage without first determining whether something critical happened during that proceeding. But this argument is not implicated by this case because the Sixth

Circuit clearly determined that something very critical did occur, namely the trial court's improper and extemporaneous reinstruction of a jury that had, until that point, declared itself hopelessly deadlocked three times. As the Sixth Circuit explained:

> *The time line of the jury's deliberation suggests that the third supplemental instruction had an effect.* Once they received the case, the jury deliberated for three days. During that time, they sent out three increasingly emphatic notes saying they were deadlocked and could not reach a verdict. Even though the trial judge twice gave them a standard deadlocked jury instruction the jury could still not reach a verdict. *Yet, less than two hours after receiving the third supplemental instruction, the jurors returned a guilty but mentally ill verdict on all counts.*

French, 282 F.3d at 902 (14a) (emphasis added).

In short, the Sixth Circuit did what Petitioner requests by examining the proceeding and determining that it was a critical stage. Since the proceeding was a critical stage and counsel was absent, the Sixth Circuit correctly applied the rule of automatic reversal.

B. Petitioner's proposed distinction between "deprivation" of counsel and "absence" is irrelevant since the Sixth Circuit found prejudice and inapplicable since the absence of counsel was not attributable to the defense.

Petitioner claims in its first question that the rule of automatic reversal does not apply because the State did not "deprive" Respondent of counsel but, instead, the defense team was to blame for the "absence" of counsel by misstating Mr. Jones' credentials at the beginning of the trial. This claim is legally wrong, irrelevant, and inapplicable to this case.

Respondent first observes that Petitioner does not cite any cases distinguishing between absences that are the fault of the court and absences that are the fault of defense counsel for

purposes of automatic reversal. On the contrary, American courts have uniformly applied the rule of automatic reversal to cases where the trial court was blameless for the absence of counsel. *See Green v. Arn*, 809 F.2d 1257, 1259-1262 (6th Cir. 1987) (applying automatic reversal rule where counsel absented himself from trial to attend funeral), *remanded on other grounds*, 488 U.S. 1034 (1989); *Vance v. Lehmann*, 64 F.3d 119, 122 (3rd Cir. 1995) ("Another situation which would warrant the application of a *per se* rule finding a violation of the Sixth Amendment is where the defendant is represented by someone with little or no legal training who is masquerading as an attorney" (string citation omitted)); *United States v. Rondon*, 204 F.3d 376, 379 (2nd Cir. 2000) (*per se* rule applies "when, unknown to the defendant, counsel was, at the time of representation, not duly licensed to practice law because of a failure ever to meet the substantive requirements for the practice of law" (citations, internal quotation marks, and enumeration emitted)).

More importantly, however, Petitioner's claim is irrelevant to the disposition of this case because the Sixth Circuit found that the absence of counsel in this case both required automatic reversal *and* "likely had a substantial and injurious influence on the jury's verdict." *French*, 282 F.3d at 901 (12a). In other words, even if this Court agrees with Petitioner that reversal in this case should require a showing of prejudice, that showing was made here.

The Sixth Circuit's finding of prejudice was correct. On direct appeal, the Michigan Court of Appeals declared the Sixth Amendment violation to be harmless without applying, or citing, the harmless beyond a reasonable doubt standard of *Chapman v. California*, 386 U.S. 18, 24 (1967). At no point in the Michigan Court of Appeals' opinion did that court consider the question required in any form of harmless error analysis: would the same result have been

reached if counsel had been present during the re-instruction of the deadlocked jury? Instead, the Michigan Court of Appeals collapsed the Sixth Amendment error into the instructional error and never applied any harmless error analysis at all to the Sixth Amendment error.

The Sixth Amendment error here was obviously prejudicial because defense counsel's absence deprived Respondent of an opportunity to influence the judge's extemporaneous deadlock instructions, to make a contemporaneous objection, and to make a timely motion for mistrial. There is no chance that Respondent's trial counsel would have sat quietly while the trial court delivered the deadlock jury instruction at issue in this case, which the Michigan Court of Appeals acknowledged was a departure from the approved A.B.A. instruction. *See People v. French*, No. 186834 (Mich. Ct. App. 1997) (43a) ("the court did not follow the ABA standard instruction in its third instruction to the jury"). Indeed, Respondent's counsel had moved for mistrial after the *first* deadlock jury note came out because he was concerned that an instruction would coerce the jury into unanimity. *See French*, 282 F.3d at 896 (5a).

After receiving the proper deadlock jury instruction, the jury issued a second deadlock note and then issued a third note that was absolutely emphatic: "We are not able to reach a verdict. We are *not* going a reach a verdict." *French*, 282 F.3d at 896 (5a) (emphasis in original). Since the defense had made an earlier motion for a mistrial in response to a much less emphatic note and had expressed concern at that time about the danger of coercing the jury, it was critical that defense counsel help shape the judge's response to the note and, if necessary, make a contemporaneous objection to that response.

It would be fantasy to believe that any competent lawyer would have sat quietly during the court's third re-instruction. If counsel had been present, he would have reminded the court,

as he did in response to the first note, that it needed to carefully avoid coercing the jury. He would have insisted that the trial court remind the dissenting jurors of the need to hold on to their conscientious beliefs. He would not have countenanced an instruction that repeatedly invoked the jurors' "oath" to return a verdict. There is no doubt that counsel would have vociferously objected to an extemporaneous instruction that bore no resemblance to the approved Michigan deadlock jury instruction.

Finally, as the Sixth Circuit specifically found, the extemporaneous instruction itself and the fact that it promptly produced a verdict from a previously hopelessly deadlocked jury make it clear that the error had a substantial and injurious impact on the verdict. *French*, 282 F.3d at 901-902 (12a-14a). Nowhere in the trial court's instruction was there even a hint of an admonition that dissenting jurors should not give up their conscientious beliefs in order to reach a verdict. *See Jenkins v. United States*, 380 U.S. 445, 446 (1965) ("the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration"); *United States v. Scott*, 547 F.2d 334, 337 (6th Cir. 1977) (finding deadlock jury instruction unconstitutionally coercive because "at no point in the supplemental charge did the trial judge remind the jurors that no one of them should surrender an honest conviction about the case simply because other jurors disagreed"); *Jiminez v. Myers*, 40 F.3d 976, 981 n. 5 (9th Cir. 1993) ("trial court's failure to give such a cautionary instruction [the warning against surrendering honest beliefs] weighs heavily in favor of the conclusion that the defendant's right to a fair trial and impartial jury has been violated"). The supplemental instruction given in the absence of counsel repeatedly stressed to the jurors that they had a duty, and were bound by the "oath" they had taken, to actually reach a verdict. To make matters worse yet, the trial court

also engaged in a colloquy with the prosecutor in front of the jury about the length of the trial in order to hammer home the point that the jury had not deliberated nearly long enough. *See French*, 282 F.3d at 896 n. 4 (16a) (quoting instruction).

As the Sixth Circuit held, this improper instruction was obviously effective. The jury, having sent out three increasingly emphatic notes indicating that it was hopelessly deadlocked, promptly returned a verdict after less than two more hours of deliberations. *French*, 282 F.3d at 902 (14a). Since defense counsel could not influence the instruction or discourage the court from giving it, could not contemporaneously object, and could not immediately move for mistrial before the jury returned with the verdict, the Sixth Circuit correctly held that the error was prejudicial and likely had a substantial and injurious effect on the verdict. *Id.* at 901 (12a).

Therefore, Petitioner's attempt to distinguish between absences of counsel caused by the court and absences caused by the defense for purposes of harmless error analysis is irrelevant to the disposition of this case. Either way, Respondent is entitled to habeas relief.

Finally, Petitioner's argument is also inapplicable to this case because it assumes that the trial court was misled into believing that Mr. Jones was serving as Respondent's counsel at the time of the third supplemental instruction, but the record shows otherwise. While the trial court may have thought that Mr. Jones was an attorney from California, the trial court's words and actions clearly show that the trial court never regarded Mr. Jones as *Respondent's counsel*.

It is true that Respondent's lead attorney had introduced Mr. Jones at the beginning of the trial as "a counsel from California, who is aiding and assisting us temporarily here." However, Mr. Jones sat silently at counsel table throughout the trial, never filed an appearance,

never moved to practice *pro hac vice*, never addressed the jury, never questioned a witness, and never made a legal argument or an objection. *See French*, 282 F.3d at 896 (4a).

The trial judge herself made it perfectly clear that she did not regard Mr. Jones as Respondent's counsel on the day of the disputed jury instruction. The judge had earlier that day instructed counsel to return to the courtroom at 2:00 p.m. *Id.* (5a). When the judge and the prosecutor returned at 2:00 p.m., Mr. Jones happened to be in the courtroom, so the judge then asked Mr. Jones to contact Mr. Pitts or Mr. Wilson so that they could be present. *Id.* After Mr. Jones' attempt to contact defense counsel failed, the judge announced that she would proceed without them, brought the jury in, and delivered the extemporaneous instruction. *Id.* The judge had waited *seven minutes* before bringing in the jury and proceeding without Respondent's lawyers. *Id.*

If the trial judge had believed Mr. Jones was Respondent's counsel, she would not have asked him to find Respondent's two attorneys of record. The conclusion is inescapable that the judge knew that she was proceeding without counsel and no court has found otherwise.

In fact, the judge later indicated that she understood that Respondent had only two lawyers. When Respondent moved for a new trial because of the absence of counsel, the prosecutor argued that Respondent had counsel present in the person of Mr. Jones. *See People v. French*, No. 186834 (37a) (recounting prosecutor's argument). After Mr. Pitts responded by pointing out that Mr. Jones had not made an appearance, was not admitted to practice in Michigan, had not been admitted to practice in Michigan, and had never questioned a witness, the court stated that the only ground for new trial having "some merit" is "the actual representation of Mr. French by *either* of his lawyers." *Id.* (38a) (emphasis added).

If the judge, who sat through the entire trial, thought that Mr. Jones was serving as Respondent's counsel, she would not have concluded that Respondent's Sixth Amendment argument had "some merit." Nor would she have referred to the issue as involving "the actual representation of Mr. French by *either* of his lawyers."

While the trial court might have thought that Ty Jones was an attorney from California, there is no indication in this record that the court was misled into believing that Mr. Jones was serving as Respondent's counsel. On the contrary, the record shows that the court understood that Mr. Jones was serving only as a "gofer" but, after waiting only seven minutes for counsel to appear, elected to go ahead without counsel. Therefore, even if there was a constitutional distinction between absences attributable to the court and absences attributable to defense counsel, this case would still fall into the former category.

C. The Sixth Circuit applied the correct standard of review.

In its third question, Petitioner complains that the Sixth Circuit was insufficiently deferential to the Michigan Court of Appeals. On the contrary, the Sixth Circuit clearly set forth and applied the standard of review set forth in the Antiterrorism and Effective Death Penalty Act of 1996, as interpreted by this Court in *Williams v. Taylor*, 529 U.S. 362 (2000). *See French*, 282 F.3d at 897-898 (6a-8a) (discussing AEDPA and *Williams*), 901 (12a) (finding Michigan courts "unreasonably applied harmless error analysis to French's deprivation of counsel").

Petitioner's third question is not presented as the Sixth Circuit correctly applied the standards of AEDPA to this case.

CONCLUSION

Therefore, Respondent Oliver French, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

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Attorney for Respondent

Dated: April 23, 2002

RECEIVED
APPELLATE DEFENDER OFFICE

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OLIVER FRENCH, JR.,

Petitioner,

Civil No. 98-CV- 74520-DT
HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

KURT JONES,

Respondent,

_____/

OPINION AND ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS[1]

Oliver French, Jr. (petitioner"), presently confined at the Carson City Regional Facility in Carson City, Michigan, seeks the issuance of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his application, filed by David A. Moran of the Michigan State Appellate Defender's Office, petitioner challenges his conviction by a jury in the Detroit Recorder's Court before the Honorable Margie R. Braxton of one count of first degree murder, M.C.L. 750.316; M.S.A. 28.548, one count of second degree murder, M.C.L. 750.317; M.S.A. 28.549, two counts of assault with intent to commit murder, M.C.L. 750.83; M.S.A. 28.278, and possession of a firearm in the commission of a felony. M.C.L. 750.227b; M.S.A. 28.424 (2). For the reasons stated below, petitioner's application for writ of habeas corpus is **GRANTED**.

I. BACKGROUND

The underlying facts of the crimes are not in dispute by the parties. On September 10, 1994, petitioner, a committeeman with the United Auto Workers Maintenance and Construction Unit

[1]Staff Attorney Daniel Besser provided quality research assistance.

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(hereinafter "the Unit") at the Ford Rouge Complex in Dearborn, Michigan, arrived at the Unit's trailer for a Saturday morning meeting with the Unit's leadership. During the meeting, petitioner pulled out a firearm and shot four of the Unit's officers, killing two men and wounding the other two. Petitioner's defense at trial was insanity, based upon the testimony of a psychologist and psychiatrist that petitioner was legally insane at the time of the shooting because he suffered from a psychotic stress disorder and had also experienced an adverse reaction to hypertension medication that he was taking at the time of the offense. The prosecution presented the testimony of two psychologists, who each testified that petitioner was legally sane at the time of the commission of the offense. The trial lasted fourteen days.

After the conclusion of the testimony, the jury began its deliberations on the afternoon of April 27, 1995 although the jury limited itself to choosing a foreperson before being dismissed by the trial court for the day. On April 28, 1995, the jury began deliberating around 9:15 a.m. At 2:58 p.m., the jury sent out the first of three notes to the trial court indicating that it was deadlocked in its deliberations. The first note stated: "We can't reach a unanimous decision. Our minds are set". The jury was brought into the courtroom, where the trial court judge acknowledged receiving the note, but indicated that the deliberations would be adjourned for the weekend.

On the morning of May 1, 1995, the trial court, outside of the jury's presence, informed the prosecution and defense counsel that it would read the deadlocked jury instruction to the jury because the court felt that the jury had not deliberated long enough. Defense counsel objected to the giving of the instruction, arguing that, in light of the definitive nature of the note, in which the jurors indicated that their minds were "set", the giving of such an instruction would be coercive. The trial court, however, instructed the jury to continue to deliberate.

The jury continued to deliberate until 3:20 p.m. that day, when it sent out a second note indicating that it was deadlocked. The second note stated: " We have followed your instructions. We are still unable to reach a decision." The trial court excused the jury for the remainder of the day.

On the morning of May 2, 1995, the trial court instructed the jury a second time to continue to deliberate. However, at 11:00 a.m., the jury sent out a third note asserting that it was still deadlocked. The third note stated: "We are not able to reach a verdict. We are not going to a [sic] reach a verdict." (emphasis original). After lunch, the trial court took up the third note from the jury with the prosecutor present, but with defense counsel absent. The trial court gave the following instruction to the jury:

> I trust you had a good lunch. I did too. We received your note that stated: "We are not able to reach a verdict. We are not underlined going a [sic] reach a verdict."
>
> That was approximately 11:00 o'clock this morning. Then we sent you to lunch to give you an opportunity to just kind of toss it around individually in your minds, and then we got you back this afternoon after lunch.
>
> Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are expected to render a verdict, you must communicate, and you must talk with each other.
>
> This case lasted how many days, Mr. Hutting [the prosecutor]? Approximately 16 days?
>
> MR. HUTTING: Fourteen days trial. For jury selection–
>
> THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.
>
> Based upon your oath that you would reach a true and just verdict, we expect you to communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, it at all possible.

> But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset that it would not be an easy task, but we know that you can rise to the occasion.
>
> So we'll ask that you return to the jury room. Thank you.

On May 3, 1995, defense counsel (Cornelius Pitts) moved for a mistrial, arguing that the jury's three notes definitively expressed that it could not reach a verdict. At the time he moved for a mistrial, Mr. Pitts was apparently unaware that his co-counsel (Monsey Wilson) had not been present when the jury was re-instructed. Shortly after the trial court denied the motion for mistrial, the jury returned with a verdict, finding petitioner guilty but mentally ill on the counts for which he was convicted.

Prior to sentencing, petitioner moved for a new trial on the basis that he was deprived of his Sixth Amendment right to counsel when the court instructed the jury, in defense counsel's absence, after receiving the third note from the jury being deadlocked. Petitioner also contended that the instruction given by the trial court was coercive.

Petitioner's motion for a new trial was argued on the day of sentencing. The prosecutor argued that, while neither Mr. Pitts or Mr. Wilson had been present when the trial court re-instructed the jury after receiving the third note indicating that they were deadlocked, he was certain that a Mr. Ty Jones had been present. Defense counsel responded that Mr. Jones was merely an investigator assisting counsel, that he was licensed to practice only in California, that he had never filed an appearance in this case, and had never addressed the court or questioned any witnesses. In addressing the motion for a new trial, the trial court noted:

This Court feels that the issue that has been brought up by Mr. Pitts as to the actual

representation of Mr. French by either of his lawyers is one that has some merit.

However, at this time, this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the non-representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The trial court, however, never explicitly addressed the issue of the absence of counsel, instead issuing a form order denying the motion for a new trial. *People v. Oliver French, Jr.*, Detroit Recorder's Court Docket # 94-010499, Order dated May 18, 1995.

Petitioner appealed his conviction to the Michigan Court of Appeals. Although the Michigan Court of Appeals found that defense counsel had not been present when the jury was re-instructed by the trial court and that a violation of petitioner's Sixth Amendment right to counsel had occurred, *People v. Oliver French, Jr.*, Michigan Court of Appeals Docket # 186834, pp. 4, 6, the Michigan Court of Appeals determined that automatic reversal of petitioner's conviction was not required and affirmed the conviction. The Michigan Supreme Court subsequently denied petitioner's application for leave to appeal on September 22, 1998. *People v. Oliver French, Jr.*, 584 N. W. 2d 924 (1998).

Petitioner has now filed an application for a writ of habeas corpus. Because this Court is granting the writ, it will limit its discussion solely to the following issue:

DID THE RE-INSTRUCTION OF THE DEADLOCKED JURY, IN THE ABSENCE OF PETITIONER'S COUNSEL, VIOLATE PETITIONER'S RIGHT TO THE ASSISTANCE OF COUNSEL AT A CRITICAL STAGE OF THE PROCEEDINGS, ENTITLING HIM TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS?

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II. STANDARD OF REVIEW

Review of a state court's decision under 28 U.S.C. §2254 is governed by the standards established by the Antiterrorism and Effective Death Penalty Act (hereinafter AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996). The Act altered the standard of review that a federal court must use for writs of habeas corpus. 28 U.S.C. §2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d); *Harpster v. State of Ohio*, 128 F. 3d 322, 326 (6th Cir. 1997); *cert den* 118 S. Ct. 1044; 140 L. Ed. 2d 1019 (1998).

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v. Smith*, 161 F. 3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. 2254 (e) (1).

The United States Court of Appeals for the Sixth Circuit only recently adopted its own standard of review for habeas cases. In *Nevers v. Killinger*, - - -F. 3d.- - - 1999 WL 97993 (6th Cir. 1999), the United States Court of Appeals for the Sixth Circuit indicated that the deference to the state courts' judgments required under the AEDPA would be achieved by adopting the rule that the unreasonableness of a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists if it is so offensive to existing precedent, so devoid

of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes. This new standard of review is an amalgam of the Fifth Circuit's standard of review, *Drinkard v. Johnson*, 97 F. 3d 751, 769 (5th Cir. 1996); *cert. den.* 520 U.S. 1107; 117 S. Ct. 1114; 137 L. Ed. 2d 315 (1997), and the First Circuit's standard of review. *O'Brien v. DuBois*, 145 F. 3d 16, 25 (1st. Cir. 1998).

III. DISCUSSION

A. The Michigan courts' finding that counsel was absent during the re-instruction of jury is entitled to the presumption of correctness.

Respondent's position throughout the state court appellate process and now before this Court is that petitioner was not deprived of the assistance of counsel when the trial court re-instructed the jury because Mr. Ty Jones was present for the re-instruction of the jury. However, the trial court, in addressing petitioner's motion for a new trial, indicated that the issue of non-representation had some merit and further conceded that this would be a critical stage in the proceedings. On appeal, the Michigan Court of Appeals found that the jury was re-instructed by the trial court at a time when the prosecutor was present but defense counsel was not. *People v. Oliver French, Jr., supra* at 4. The Court of Appeals also acknowledged that there was a violation of petitioner's Sixth Amendment right to counsel, *People v. Oliver French, Jr.*, at 6, although the Court declined to reverse petitioner's conviction.

A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v. Smith*, 161 F. 3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. 2254 (e) (1). A state appellate court's findings of fact are also entitled to the presumption of correctness. *Martin v. Rose*, 744

F. 2d 1245,1252 (6th Cir. 1984); *Smith v. Perini*, 723 F. 2d 478, 480 (6th Cir. 1983); *cert. den.* 466 U.S. 941; 104 S. Ct. 1920; 80 L. Ed. 2d 466 (1984). Cases decided after the passage of the AEDPA have also applied the presumption of correctness to state appellate court findings of fact. *Bocian v. Godinez*, 101 F. 3d 465, 467 (7th Cir. 1996); *Bowles v. Berge*, 999 F. Supp. 1247 (E.D. Wis. 1998). Additionally, when the record is ambiguous, a state appellate court's factual findings are deemed to be fairly supported by the record, and thus presumed correct, when later challenged in federal habeas corpus proceedings. *Palmer v. Estelle*, 985 F. 2d 456, 459 (9th Cir. 1993); *cert. den.* 509 U.S. 928; 113 S. Ct. 3051; 125 L. Ed. 2d 735 (1993). Finally, the presumption of correctness accorded by a federal habeas court to factual findings of a state court applies not only to a state court's express factual findings, but also to the implicit resolution of disputes that can fairly be inferred from the state record. *Armstrong v. Young*, 34 F. 3d 421, 426 (7th Cir. 1994); *cert. den.* 514 U.S. 1021; 115 S. Ct. 1369; 131 L. Ed. 2d 224 (1995)(cites omitted).

In the present case, respondent has not offered any clear and convincing evidence to this Court to overturn the presumption that the Michigan Court of Appeals' finding that defense counsel was absent during the re-instruction of the jury was incorrect. Although at the beginning of trial, petitioner's attorney (Mr. Pitts) introduced Mr. Ty Jones as an attorney from California who was "temporarily" assisting with the defense, there is no indication from the record that Mr. Jones was ever admitted to practice *pro hac vice* in Michigan by the trial court, as provided in Rule 15, § 2 of Rules Concerning the Michigan State Bar, nor did Mr. Jones ever question any witnesses, make any objections, or even place an appearance on the record. Indeed, when the jury was re-instructed by the trial court, there was no appearance placed on the record by anyone purporting to represent petitioner, and, while the trial court specifically addressed the prosecutor, she never spoke to anyone

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representing petitioner, nor were any contemporaneous objections to this instruction made by anyone representing petitioner, even though petitioner's attorney (Cornelius Pitts) had objected to a similar deadlocked jury instruction being given after the first note was received from the jury indicating that they were deadlocked. In light of the record presented from the state trial court concerning the re-instruction of the jury by the trial court, there is no evidence to show that Mr. Jones or anyone else was present on behalf of petitioner at that critical stage in the proceedings. Respondent has not presented any convincing evidence that the Michigan Court of Appeals' determination that counsel was not present when the jury was re-instructed should not be entitled to the presumption of correctness.

Respondent additionally contended at oral argument that the Michigan Court of Appeals never explicitly found that counsel was not present when the jury was re-instructed by the trial court. This contention is without merit. On page 4 of the opinion, the Michigan Court of Appeals stated that the court took up the jury's third note about being deadlocked "at a time when the prosecutor was present but defense counsel were not." This is an explicit finding that counsel was not present. Moreover, on page 6 of the opinion, the Michigan Court of Appeals concluded that petitioner's Sixth Amendment right to counsel had been violated. Even if this were not an express factual finding that counsel was absent for the re-instruction of the jury, the Court of Appeals' finding that the Sixth Amendment right to counsel was violated was clearly an "implicit resolution of disputes that can fairly be inferred from the state record and would therefore be entitled as well to the presumption of correctness". *Armstrong v. Young*, 34 F. at 426.

This Court also notes that respondent conceded at oral argument conducted in this case that no one from the Wayne County Prosecutor's office showed up for oral argument at the Michigan

Court of Appeals, to amplify or correct the state trial court record. Respondent also acknowledged that the prosecutor never filed an application for leave to appeal as cross-appellant with the Michigan Supreme Court, as allowed under M.C.R. 7.302 (D)(2). Nor did respondent move for a rehearing in the Michigan Court of Appeals pursuant to M.C.R. 7.215 (G)(1). Federal courts have held that, where a habeas petitioner did not challenge the facts set forth in the state appellate court's opinion affirming the conviction and sentence, the federal habeas court would presume the facts correct for purposes of reviewing the habeas petition. *United States ex. rel. Frierson v. Gramley*, 952 F. Supp. 578, 581 (N.D. Ill. 1997). Because the State of Michigan never challenged the Michigan Court of Appeals' findings of fact either by way of a motion for rehearing in the Michigan Court of Appeals or by an application for leave to appeal as cross-appellant in the Michigan Supreme Court, this Court will presume that the Michigan Court of Appeals' finding that petitioner's counsel was absent during the re-instruction of the jury was a correct determination.

B. The Michigan Court of Appeals' holding that the absence of counsel at a critical stage of the proceedings did not entitle Petitioner to automatic reversal of his conviction is contrary to, or an unreasonable application of, current federal law as determined by the United States Supreme Court.

The Michigan Court of Appeals' determination that petitioner was not entitled to the automatic reversal of his conviction because of the absence of his counsel during the re-instruction of the jury is contrary to, or an unreasonable application of, current Federal law as determined by the United States Supreme Court. Petitioner is therefore entitled to the issuance of a writ of habeas corpus.

The Sixth Amendment right to the assistance of counsel is made obligatory upon the states by the Due Process clause of the 14th Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342-344;

83 S. Ct. 792; 9 L. Ed. 2d 799 (1963). The presumption that counsel's assistance is essential requires a court to conclude that a trial is unfair if the accused is denied counsel at a critical stage of the trial. *United States v. Cronic*, 466 U.S. 648, 659; 104 S. Ct. 2039; 80 L. Ed. 2d. (1984); *See also Penson v. Ohio*, 488 U.S. 75, 88; 109 S. Ct. 346; 102 L. Ed. 2d 300 (1988). The United States Supreme Court has routinely found constitutional error without any specific showing of prejudice to a defendant when counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings. *United States v. Cronic*, 466 U.S. at 659, fn.25; *United States v. Minsky*, 963 F. 2d 870, 874 (6th Cir. 1992). The existence of certain structural defects in a trial, such as the deprivation of the right to counsel, requires automatic reversal of the conviction because it infects the entire trial process. *Brecht v. Abrahamson*, 507 U.S. 619, 629-630; 113 S. Ct. 1710; 123 L. Ed. 2d 353 (1993). In certain Sixth Amendment contexts, prejudice from the deprivation of counsel is so likely that a case-by-case inquiry into prejudice is not worth the cost. *Strickland v. Washington*, 466 U.S. 668, 692; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984). Other cases have also held that reversal of a criminal conviction is automatic whenever a defendant is deprived of the assistance of counsel during a critical stage of the proceedings, particularly in the prosecution of a capital offense. *Holloway v. Arkansas*, 435 U.S. 475, 489; 98 S. Ct. 1173; 55 L. Ed. 2d 426 (1978).

Numerous courts have applied the automatic reversal standard in cases where a criminal defendant was deprived of the assistance of counsel at a critical stage. *See Green v. Arn*, 809 F. 2d 1257, 1263 (6th Cir. 1987); rem oth gds, 488 U.S. 1034; 109 S. Ct. 847; 102 L. Ed. 2d 979 (1989) reaffirmed 839 F2d 300 (1988)(*Cronic* rule of automatic reversal applies when counsel is absent during the taking of evidence); *United States v. Minsky*, 963 F. 2d at 874 (reversal

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automatic when counsel excluded from a sidebar conference); and *Carter v. Sowders*, 5 F 3d 975, 979 (6th Cir. 1993) (reversal automatic when counsel absent from a pre-trial deposition). These cases clearly show that the automatic reversal rule enunciated by the United Supreme Court in *Cronic* has been consistently applied in various situations where a criminal defendant was deprived of the assistance of counsel at a critical stage in the proceedings. Additionally, although a harmless error standard of review is appropriate in some instances where counsel is absent, there are some stages in the trial where the deprivation, by its very nature, cannot be deemed harmless. *Green v. Arn*, 809 F. 2d at 1263; (citing *Rushen v. Spain*, 464 U.S. 114, 117 fn. 2; 104 S. Ct. 453, 455 78 L. Ed. 2d 267 (1983)).

Jury deliberations and the return of a jury verdict constitute critical stages of criminal proceedings for purposes of the Sixth Amendment. *Siverson v. O'Leary*, 764 F. 2d 1208, 1214 (7th Cir. 1985); *United States v. Smith*, 411 F. 2d 733, 736 (6th Cir. 1969). Courts have indicated that a harmless error standard may be appropriate where a jury verdict is accepted in the absence of counsel. *United States v. Osterbrock*, 891 F. 2d 1216, 1218 (6th Cir. 1989); *See also Siverson v. O'Leary*, 764 F. 2d at 1217. However, the giving of additional jury instructions from a judge to a jury, without notifying a defendant or his or her counsel, is not deemed harmless error. *Rushen v. Spain*, 464 U.S. at 119, fn. 4 (quoting *Rogers v. United States*, 422 U.S. 35, 38-40; 95 S. Ct. 2091; 2094-2095; 45 L. Ed. 2d 1 (1975)).

In *Curtis v. Duvall*, 124 F. 3d 1 (1st Cir. 1997), the United States Court of Appeals for the First Circuit was confronted with the same situation that is before this Court, namely, giving of supplemental instructions to the jury without trial counsel being present. The First Circuit Court of Appeals found that the giving of a *sua sponte* jury instruction without consulting with, and in the

absence of defense counsel, denied the defendant the assistance of counsel at a critical stage of the proceedings. Although the deprivation was of short duration, the Court of Appeals determined that it occurred during "a vital point in the trial and was, within its limits, total." *Curtis*, at 4-5. The Court in *Curtis* declined to grant habeas relief to the petitioner solely because his conviction had become final in 1983, one year before *Cronic* was decided. *Id.* at 6. However, the First Circuit indicated that, if it were to apply *Cronic* and its progeny, reversal would be required. *Id.*

The sole difference between petitioner and the defendant in *Curtis* redounds to the benefit of petitioner, namely, the fact that his conviction occurred in state court eleven years after the ruling in *United States v. Cronic*, seven years after the United States Supreme Court re-affirmed this principle in *Penson v. Ohio*, and two years after the United States Supreme Court reaffirmed the principle that the absence of counsel requires automatic reversal in *Brecht v. Abrahamson*. At the time of petitioner's conviction, the clearly established federal law, as determined by the United States Supreme Court, was that the denial or absence of counsel at a critical stage in the criminal proceedings entitled a defendant to automatic reversal of the conviction, without any further inquiry to determine prejudice. Moreover, the United States Supreme Court had clearly indicated that the giving of additional instructions by a judge to a jury in the absence of counsel would not be considered harmless error. *Rushen v. Spain*, 464 U.S. at 119, n. 4; *Rogers v. United States*, 422 U.S. at 38-40. The Michigan Court of Appeals' determination that petitioner was not entitled to the automatic reversal of his conviction where counsel was absent when the jury was re-instructed by the trial court judge was contrary to, or an unreasonable application of, clearly established federal law as determined by the United States Supreme Court. As such, petitioner has established that he is entitled to the issuance of a writ of habeas corpus.

The cases cited by respondent do not support her position that the decision by the Michigan Court of Appeals was reasonable. In the *Rushen* case, the United States Supreme Court merely held that an unrecorded *ex parte* communication between a judge and a juror can be harmless error. As already indicated by this Court, the Supreme Court in *Rushen* also stated that it would not be harmless error for a trial court judge to give supplemental instructions to a jury in the absence of counsel.

The case of *Vines v. United States*, 28 F. 3d 1123, 1127-1128 (7th Cir. 1994), which respondent brought to this Court's attention at oral argument, merely states that a defendant is not entitled to a presumption of prejudice based upon a brief absence of counsel during one day of the trial *where it does not occur at a critical stage of the trial. Id.* at 1128 (emphasis added). The *Vines* court merely reasserted the principle enunciated in *Cronic* and noted that, to establish the presumption of prejudice from counsel's absence for a brief period during trial, a defendant must also establish that counsel was denied at a critical stage in the proceedings. The *Vines* court concluded that the defendant was not deprived of the assistance of counsel when the defense attorney was absent during a period of the trial where evidence was being presented against the co-defendants.

By contrast, petitioner here has clearly established that he was deprived of the right to the assistance of counsel during a critical stage of the trial, namely, the trial court's re-instruction of a jury that had on three separate occasions indicated to the court that it was hopelessly deadlocked. Although this "deprivation was short-lived, it occurred during a vital point in the trial and was, within its terms, total." *Curtis v. Duvall*, 124 F. 3d at 4-5. Because petitioner was deprived of the assistance of counsel during a critical stage of the proceedings, reversal of his conviction is

automatic. The Michigan Court of Appeals' failure to apply *Cronic* or its progeny, let alone to mention any of these cases in its holding, was an unreasonable application of clearly established federal law. Petitioner is therefore entitled to the issuance of a writ of habeas corpus.

Although automatic reversal of petitioner's conviction is required because he was deprived of the assistance of counsel during a critical stage of the proceedings in the state court, this Court also agrees with petitioner that he would be entitled to the issuance of a writ of habeas corpus because the Michigan Court of Appeals did not even apply a harmless error analysis in determining whether the same result in this case would have been reached had counsel been present during the re-instruction of the jury. Before a federal constitutional error which is not a structural error can be held harmless beyond a reasonable doubt, the reviewing court must be able to declare a belief that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24; 87 S. Ct. 824; 17 L. Ed. 2d 705 (1967). Another judge in the Eastern District of Michigan has concluded that the AEDPA, if applied, would not preclude federal habeas relief where a state court failed to apply the *Chapman* harmless error standard. *Barker v. Yukins*, 993 F. Supp. 592, 602-603 fn. 7 (E.D. Mich. 1998)(Rosen, J.); citing *Jeffries v. Wood*, 114 F. 3d 1484, 1500-1501 (9th Cir. 1997).

Subsequently, the United States Court of Appeals for the Sixth Circuit, in affirming the granting of a writ of habeas corpus in another case, did so in part based on its conclusion that the Michigan Supreme Court's application of the *Chapman* harmless error standard to the particular facts in that case was not reasonable. *Nevers v. Killinger*,---F. 3d---1999 WL 97993, Slip Opinion at 22 (6th Cir. 1999).

As petitioner notes, the Michigan Court of Appeals never applied the *Chapman* harmless

error analysis in determining whether trial counsel's absence was harmless beyond a reasonable doubt. Instead, the Michigan Court of Appeals simply analyzed the trial court's instruction and determined that it was not unduly coercive. Even if the error complained of by petitioner was subject to a harmless error analysis, this Court would still grant the writ based upon the Michigan Court of Appeals' failure to employ the *Chapman* harmless error standard in determining whether reversal was required. Nonetheless, because petitioner was deprived of the assistance of counsel during a critical stage in the proceedings, reversal of his conviction is automatic, and a harmless error standard would simply be inapplicable.

IV. CONCLUSION

Because petitioner was deprived of the assistance of counsel during a critical stage in his state criminal trial, reversal of his conviction is automatic. The Michigan Court of Appeals' failure to automatically reverse petitioner's conviction was based upon an unreasonable application of clearly established federal law. Petitioner is entitled to the issuance of a writ of habeas corpus. Because this Court is granting petitioner the writ based upon counsel's absence during a critical stage of the criminal proceedings, this Court concludes that it is unnecessary to determine whether the jury instruction given by the trial judge in the absence of counsel was unduly coercive.

V. ORDER

IT IS HEREBY ORDERED THAT PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS IS CONDITIONALLY GRANTED. UNLESS THE STATE TAKES ACTION TO AFFORD PETITIONER A NEW TRIAL WITHIN NINETY (90) DAYS OF THE DATE OF THIS OPINION, HE MAY APPLY FOR A WRIT ORDERING RESPONDENT TO RELEASE HER FROM CUSTODY FORTHWITH.

ARTHUR J. TARNOW

HONORABLE ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

Dated: MAR 25 1998

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY CRichard
DEPUTY CLERK

FILED
JUL 1 8 2000
LEONARD GREEN, Clerk

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 99-1436

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OLIVER FRENCH, JR.,	)	
	)	ON APPEAL FROM THE
Petitioner-Appellee,	)	UNITED STATES DISTRICT
	)	COURT FOR THE EASTERN
v.	)	DISTRICT OF MICHIGAN
	)	
KURT JONES,	)	OPINION
	)	
Respondent-Appellant.	)	

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
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Before: NORRIS, MOORE, and COLE, Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Respondent-Appellant Kurt Jones ("the Warden") appeals the district court's issuance of Petitioner-Appellee Oliver French's writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See French v. Jones*, 41 F. Supp. 2d 726 (E.D. Mich. 1999). The district court issued the habeas writ on the basis that the Michigan trial court conducted a critical stage in French's trial while his counsel was absent. *See id.* at 735; *United States v. Cronic*, 466 U.S. 648, 659 (1984). Because the record before us fails to clarify a fact central to the determination of whether the adjudication of French's claim by the Michigan state courts "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," *see* 28 U.S.C. § 2254(d)(1), we VACATE the ruling of the district court and REMAND the case to the district court for an evidentiary hearing and findings consistent with this opinion.

I. FACTS AND PROCEDURAL BACKGROUND

We recount only the facts essential to our disposition of this appeal. French was tried by a jury and found guilty but mentally ill of one count of first-degree murder, Mich. Comp. Laws. § 750.316, one count of second-degree murder, *id.* § 750.317, two counts of assault with intent to commit murder, *id.* § 750.83, and one count of possession of a firearm during the commission of a felony, *id.* § 750.227b. French was sentenced to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years' imprisonment for the each of the second-degree murder and assault with intent to murder convictions, and two years' consecutive imprisonment for the firearm conviction. At trial, French was represented by at least two attorneys, Cornelius Pitts and Monsey Wilson. Ty Jones, an attorney from California, was also present at defense counsel's table for at least portions of the trial; the precise role Jones played is at issue in this case and, as we discuss further below, remains unresolved.

During its deliberations, the jury sent three separate notes to the trial judge over the course of several days, each time indicating that it was unable to reach a verdict. After the judge received the first note, Pitts moved for a mistrial. The judge denied the motion and instructed the jury to continue deliberating. The judge again instructed the jury to continue deliberating after receiving the second note. After receiving the third note, the trial judge gave a third instruction to the jury (the "supplemental instruction"). The parties agree that, at the time of this supplemental instruction, Pitts and Wilson were absent, but Jones and French were present. While giving the supplemental

instruction, the trial judge asked the prosecutor how long the case had lasted; the prosecutor responded, "Fourteen days trial. For jury selection --." Jones said nothing.

The day after the supplemental instruction, Pitts moved for a mistrial on the basis that, in light of the three jury notes, the court's decision to permit the jury to continue deliberating "border[ed] . . . upon a situation where we are forcing someone to do something against their will." Immediately after the judge denied the motion, the jury came back with its guilty verdict. French moved for a new trial, and Pitts argued the motion on the day of sentencing. Pitts asked the court for an evidentiary hearing regarding what had occurred at the time of the court's supplemental jury instruction and argued that French had been prejudiced because defense counsel had not had the opportunity to object to the court's instruction to the jury or to respond to the question the judge put to the prosecutor regarding the length of the trial. The prosecutor responded that although Pitts and Wilson were indeed absent during the interchange following the third note, Ty Jones had been present, and that Jones had been acting as co-counsel throughout the trial. After the exchange, the judge indicated that Pitts's argument had "some merit," but that she would consider it at a later time and proceed with the sentencing forthwith:

> This Court feels that the issue that has been brought up by Mr. Pitts as to the actual representation of Mr. French by either of his lawyers is one that has some merit. However, at this time this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the none [sic] representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The court never addressed Pitts's argument further, but did issue a form order overruling French's motion for a new trial.

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On direct appeal to the Michigan Court of Appeals, French argued that his Sixth Amendment right to counsel had been violated because the trial court had delivered the supplemental instruction in the absence of defense counsel. *See People v. French*, No. 186834, at 1 (Mich. Ct. App. July 15, 1997). In addressing French's claim, the Michigan Court of Appeals stated in its recitation of the facts that the trial court had addressed the jury's third note and given its supplemental instruction "at a time when the prosecutor was present but defense counsel were not." *Id.* at 4. In its analysis of French's Sixth Amendment claim, the court acknowledged the rule of *Cronic* -- that a court must find "constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," *id.* at 6 (citing *Cronic*, 466 U.S. at 659 n.25) -- and noted that "[c]ommunications with a deliberating jury outside the presence of the counsel are prohibited." *Id.* (citation omitted). The court went on, however, to find that there is no presumption of prejudice if the communication with the jury is simply an "administrative communication" such as an "instruction[] that encourage[s] a jury to continue its deliberations." *Id.* The court concluded that "while defendant's Sixth Amendment right was violated, reversal is not required." *Id.* The Michigan Supreme Court denied French's application for leave to appeal. *See People v. French*, 584 N.W.2d 924 (1998).

French filed a petition for a writ of habeas corpus in the district court in October 1998. In the petition, French argued that he was entitled to the writ because the trial court had conducted a

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critical stage of the proceeding against him in the absence of defense counsel.[1] The district court heard argument on the petition on March 17, 1999. Neither party moved for an evidentiary hearing in the district court, and none was held. The court conditionally granted the writ on March 25, 1999. *See French*, 41 F. Supp. 2d at 735. The Warden filed a timely notice of appeal.

II. DISCUSSION

A.

The Warden first argues that Jones was representing French as his attorney at the time of the supplemental jury instruction. Because the parties agree that Jones was present and that Pitts and Wilson were absent at the time of the instruction, the key issue here is the precise role Jones played in French's defense. Because the record fails to clarify Jones's role, we are constrained to remand the case to the district court for an evidentiary hearing and further findings of fact and conclusions of law.

We review the district court's grant of habeas relief de novo. *See Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997), *cert. denied*, 522 U.S. 1112 (1998). In determining whether to issue a habeas writ, the district court's review of a state court decision is governed by the standards set forth

[1]French also argued that he was entitled to the writ because the trial court's supplemental jury instruction was unconstitutionally coercive. The district court did not reach this issue because it granted the writ based upon the Sixth Amendment issue. *See French*, 41 F. Supp. 2d at 729-30. Because the district court did not reach the issue of whether the instruction was unconstitutionally coercive, we do not address it here.

in the Antiterrorism and Effective Death Penalty Act ("AEDPA").[2] *See id.* Title 28 § 2254(d) provides as follows:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In his habeas petition, French argued that the Michigan appeals court's failure to reverse his conviction was either contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court.[3] *See* 28 U.S.C. § 2254(d)(1). The district court

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[2]We decide this case pursuant to AEDPA because French filed his petition for a writ of habeas corpus in October 1998, well after AEDPA's effective date of April 24, 1996. *See Barker v. Yukins*, 199 F.3d 867, 871 (6th Cir. 1999).

[3]The Warden argues that the district court violated § 2254(d)(2) because it issued the habeas writ based upon the Michigan Court of Appeals' statement that the trial judge had given the supplemental jury instruction in the absence of defense counsel. *See People v. French*, No. 186834, at 4. The Warden contends that the appeals court's statement is an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2). Thus, the Warden argues, issuance of the writ was barred by § 2254(d)(2).

This argument convolutes the meaning and purpose of § 2254(d)(2). Section 2254(d)(2) provides an alternative to § 2254(d)(1) and serves as a basis upon which a federal court may grant a habeas writ. *See* 28 U.S.C. § 2254(d)(1) and (2). French brought his petition under subsection (d)(1), and the district court granted the petition under that subsection. Whether the petition could or should have been granted under subsection (d)(2) has no bearing on this case, and we do not address it here.

granted the writ on that basis, under the standard set forth by this court in *Nevers v. Killinger*, 169 F.3d 352 (6th Cir.), *cert. denied*, 527 U.S. 1004 (1999). *See French*, 41 F. Supp. 2d at 730, 732. Since the date of the district court's decision, the Supreme Court has clarified the meaning of the operative clauses in § 2254(d)(1). *See Williams v. Taylor*, -- U.S. --, 120 S. Ct. 1495 (2000). Further, we have held that "*Nevers* . . . no longer correctly state[s] the law on the issue of the appropriate standard under 28 U.S.C. § 2254(d)," and that *Williams* does. *Harris v. Stovall*, 212 F.3d 940, 43 (6th Cir. 2000). In *Williams*, the Supreme Court described the appropriate application of § 2254(d) as follows:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams, 120 S. Ct. at 1523.

The question of whether French was deprived of his right to counsel is a mixed question of law and fact. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984). In a habeas case, we apply the "unreasonable application" prong of § 2254(d)(1) to a mixed question of law and fact. *See Harpster*, 128 F.3d at 327; 28 U.S.C. § 2254(d)(1). The clearly established federal law upon which both French and the district court rely is that an appeals court must reverse a criminal defendant's conviction "without any specific showing of prejudice to [the] defendant when [his] counsel is either totally absent, or prevented from assisting the accused during a critical stage of the proceedings."

French, 41 F. Supp. 2d at 732 (citing *Cronic*, 466 U.S. at 659 n.25; *United States v. Minsky*, 963 F.2d 870, 874 (6th Cir. 1992)). We agree that the Supreme Court has clearly established that the "complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v. Flores-Ortega*, 120 S. Ct. 1029, 1038 (2000); *Penson v. Ohio*, 488 U.S. 75, 88 (1988); *Cronic*, 466 U.S. at 659 and 659 n.25; *see also United States v. Russell*, 205 F.3d 768, 771 (5th Cir. 2000) ("*Cronic* holds that because the guiding . . . hand of counsel is essential, 'a trial is unfair if the accused is denied counsel at a *critical* stage of his trial.'") (citing *Cronic*, 466 U.S. at 658) (emphasis added in original); *Curtis v. Duval* 124 F.3d 1, 4 (1st Cir. 1997) ("*Cronic* and its progeny do indeed stand for the proposition that the actual or constructive denial of counsel at a critical stage of a criminal trial constitutes prejudice per se and thus invalidates a defendant's conviction.").[4] We also agree with the district court that the return of a supplemental jury instruction is a "critical stage" of a criminal proceeding.[5] *See Rogers v. United States*, 422 U.S. 35 (1975);

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[4]We recognize, of course, that "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), means what it says: a federal court conducting habeas review must look to the Supreme Court case law to determine whether a petitioner is entitled to a habeas writ pursuant to § 2254(d)(1). *See Williams*, 120 S. Ct. at 1523. Thus, the state court decisions upon which the Warden relies in his brief are irrelevant to our review of the district court's decision. We note some federal appellate court decisions here only for the sake of emphasizing what the Supreme Court itself has already held.

[5]Both the Michigan trial and appeals courts appear to agree that a supplemental jury instruction is a "critical stage." The trial judge "concede[d]" that the supplemental instruction she gave occurred "at a period that this Court will concede would be a critical stage in these proceedings." Likewise, the appeals court stated that "[j]ury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment." *People v. French*, No. 186834, at 6 (citing *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985).

Shields v. United States, 273 U.S. 583 (1927); *see also Curtis*, 124 F.3d at 4 (stating that "recalling the jury for supplementary instructions after deliberations are underway is a critical stage of a criminal trial"). Thus, we agree with the legal principle put forth by the district court.

Despite our agreement with the district court's statement of the law, we are unable to determine whether French was truly without counsel at the time of the trial court's supplemental jury instruction. The record is altogether unclear as to whether Jones was acting as counsel to French, or was present in some other capacity.[6] The district court based its conclusion that Jones was not acting as counsel on several considerations. *See French*, 41 F. Supp. 2d at 731-32. Most salient among these considerations were the statement by the Michigan Court of Appeals that the trial court had given its supplemental jury instruction "at a time when the prosecutor was present but defense counsel were not," *People v. French*, No. 186834, at 4, and the appeals court's conclusion that "[French's] Sixth Amendment right was violated."[7] *Id.* at 6. The district court determined that these

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[6]The Warden labels as "disturbing" and "completely erroneous" the district court's finding that "there is no evidence to show that Mr. Jones or anyone else was present on behalf of petitioner" at the time of the supplemental jury instruction. *See French*, 41 F. Supp. 2d at 731. The Warden reads the district court's statement to mean that Jones was not *physically* present. It is clear from the context of the court's statement, however, that the court was indicating that neither Jones nor anyone else was present *as an attorney* for French at the time of the instruction. *See id.* Regardless, the parties agree that Jones was physically present during the instruction. Our concern on appeal is whether French was represented by counsel.

[7]The other considerations taken into account by the district court -- for instance, the facts that Jones did not file an appearance with the trial court, that he was not admitted to practice before that court, and that he made no objection at the time of the supplemental jury instruction, *see French*, 41 F. Supp. 2d at 731 -- have some persuasive effect. They do not, however, resolve on their own the question of whether Jones's presence defeats French's claim that the trial court proceeded in the

statements by the state appeals court were findings of fact, and, as such, were entitled to a presumption of correctness pursuant to § 2254(e)(1). *See French*, 41 F. Supp. 2d at 730-32. The district court erred in this analysis.

It is true that § 2254(e)(1) creates a presumption in favor of a state court's finding of fact. *See* 28 U.S.C. § 2254(e)(1). This presumption applies, for instance, to the *facts* that Pitts and Wilson were absent and that Jones was physically present during the trial court's supplemental instruction. The presumption of § 2254(e)(1) does not, however, apply to the state appeals court's *legal conclusion* that French was without defense counsel at the time of the instruction. As we noted, *supra*, the question of whether French was deprived of counsel at the time of the supplemental instruction is a mixed question of law and fact -- it requires not only an analysis of whether anyone was physically present with French at the time of the instruction, but also whether the person there was acting in the capacity of counsel. Under AEDPA, a federal court must review a state court's conclusion regarding a mixed question of law and fact pursuant to the "unreasonable application" standard set forth in § 2254(d)(1). *See Harpster*, 128 F.3d at 327.

In this case, the only way to know whether the state trial and appeals courts applied federal Sixth Amendment law in an unreasonable manner is to determine the precise nature of the role Jones played at French's trial. We simply cannot conduct any meaningful review of the state court

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complete absence of counsel.

decisions without knowing more about what Jones did at trial.[8] For this reason, we remand the case to the district court for an evidentiary hearing and further findings of fact and conclusions of law regarding the nature and scope of the role that Jones played at French's trial and at the time of the supplemental jury instruction.

B.

The Warden also argues that, even if error occurred in the trial court, such error was a "trial error" based in either defense counsel's ineffectiveness or the trial court's ex parte communication, and not a "structural error" deriving from the complete deprivation of counsel. As such, the Warden asserts, the district court erred in presuming that the absence of counsel was prejudicial and in failing to find that any error was harmless. Because our determination of what, if any, error occurred in the trial court turns on the precise nature of Jones's role at trial, we decline to address the Warden's argument at this time. We note, however, that the district court may also wish to explore further the circumstances surrounding the absence of Pitts and Wilson and the nature of the trial judge's communication with the prosecutor at the time of the supplemental jury instruction.

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[8]French argues that we may not remand for an evidentiary hearing sua sponte and that we must accept the state court findings, pursuant to § 2254(e)(1), because the Warden has failed to meet his burden under that section of proving the state court findings to be erroneous. We disagree. It is true that the factual findings of the Michigan courts which support habeas relief are presumed to be correct unless the Warden can prove by clear and convincing evidence that they are erroneous. *See* 28 U.S.C. § 2254(e)(1); *Burden v. Zant*, 498 U.S. 433, 436-37 (1991). This does not constrain us, however, from finding further facts that the state court failed to illuminate. Because we cannot complete our review under § 2254(d)(1) without knowing more about what happened at trial, an evidentiary hearing is necessary.

2 Jb

III. CONCLUSION

For the foregoing reasons, we VACATE the district court's opinion and REMAND this case to the district court for further proceedings consistent with this opinion.